IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 3607 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KRISHNA COMMUNICATION(OUTDOOR) - Petitioner(s)
Versus
GUJARAT STATE ROAD TRANSPORT CORPORATION & 1 - Respondent(s)

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Appearance :
MR SI NANAVATI, Sr. Advocate with MR MJ PARIKH for Petitioner(s) : 1,
MR KB TRIVEDI Advocate General with MR HS MUNSHAW for Respondent(s): 1,
MR MIHIR JOSHI, Sr Advocate with MR AJAY S JAGIRDAR for Respondent(s) : 2,
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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 08/03/2006
ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

Rule. Mr Munshaw waives service of Rule for respondent No.1 and Mr Jagirdar waives service of Rule for respondent No.2.

2. In this petition under Article 226 of the Constitution, the petitioner, an advertising agency, has challenged the tendering process adopted by the respondent-Corporation under which the eligible parties who have submitted their tenders in response to the notice dated 23.1.2006 are not called for inter-se bidding but only respondent No.2 is called for revising its bid in the matter of contract to be awarded by respondent No.1- Gujarat State Road Transport Corporation for providing spaces for advertisement on buses, bus depots and bus shelters.

3. The facts leading to filing of this petition, broadly stated, are as under:-

3.1 The present petitioner is the existing contractor in whose favour the contract providing spaces for advertisements on bus, bus depots and bus shelters of the respondent-Corporation was awarded for the three year period from 15.12.2002 to 14.12.2005. Since the contract period was going to expire by efflux of time in December 2005, the respondent-Corporation initiated the process for inviting fresh tenders for the subsequent period.

(i) The first tender notice for that purpose was issued on 6.4.2005 inviting separate tenders for buses and bus depots/bus shelters. It is the petitioner's case, and no disputed by the other side, that the petitioner's offer was the highest in the matter of contract for providing space for advertisements on buses, which is the major component of the contract and was the second highest in the other category of bus depots/bus shelters. However, the Corporation discharged the said tender notice.

(ii) The Corporation issued the second tender notice in August 2005 with certain modifications in the tender conditions. However, no tenders were received pursuant to the said notice.

(iii) The Corporation issued the third tender notice in October 2005. The sealed tenders were opened on 18.10.2005 but again the Corporation took the decision on 21.10.2005 to discharge the tender notice. At the negotiations held on 10.11.2005, the bidders suggested that only one contract be awarded for 5

years and for both the segments.

(iv) Accordingly, the Corporation issued the fourth tender notice dated 12.12.2005. Tenders were invited for the contract for providing space for advertisement for a five year period instead of the three year period for which the contracts were awarded earlier and the single tenders were invited for all the spaces for advertisement i.e. the buses and bus depots/bus shelters as against the previous method of awarding separate contracts for the three segments. The tenders received in December 2005 were as under:-

Sr. No	**Tenderer**	**Tender Amount for five year in Rs.**
1.	M/s. Krishna Communication (Outdoor), (Petitioner)	10,86,60,000/-
2.	M/s. Sambhav Media Ltd.	10,54,00,000/-
3.	M/s. Pioneer Publicity	10,51,00,000/-
4.	M/s. Chitra Publicity (Respondent No.2)	6,96,00,000/-

However, the Corporation again decided to discharge the tender notice.

(v) The Corporation issued the fifth tender notice on 23.1.2006 inviting fresh single tenders for the five year period for all the segments. As on previous occasions, the tenders were invited in the two bid system, one being the technical bid and the other being the price bid.

3.2 Before the tenders received pursuant to NIT (Notice Inviting Tenders) dated 23.1.2006 were to be opened on 10.2.2006, the present petitioner filed Special Civil Application No.1940 of 2006 challenging the decision of the Corporation not to consider the tenders received pursuant to the tender notice dated 12.12.2005 and submitted that in the past whenever the petitioner's tender was the highest, the Corporation decided to discharge the tender notice and that the petitioner apprehended that the Corporation would take the decision to award the contract only when some other party would quote the highest offer. During pendency of the said petition, the tenders received pursuant to NIT dated 23.1.2006 came to be opened on 10.2.2006 and the following offers were received :-

Sr.No	**Tenderer**	**Tender Amount for five year in Rs.**
1.	M/s. Chitra Publicity (Respondent No.2)	13,11,87,000/-
2.	M/s. Sambhav Media Ltd.	12,69,00,000/-

Sr.No	Tenderer	Tender Amount for five year in Rs.
3.	M/s. Pioneer Publicity Corporation	11,86,00,000/-
4.	M/s. Prithvi Associates	10,89,00,000/-
5.	M/s. Krishna Communication (Outdoor) (Petitioner)	10,86,60,000/-

Thereafter the said petition was heard and disposed of on 14.2.2006. The Court did not find fault with the decision of the Corporation to discharge the NIT dated 12.12.2005 because the offers received by the Corporation in response to the NIT dated 23.1.2006 were substantially higher than the offers received by the Corporation in response to the NIT of December 2005. However, it was contended on behalf of the present petitioner, who was also the petitioner in the said petition, that the petitioner was prepared to offer higher price in response to the current NIT and, therefore, he would like to submit a higher offer to the Corporation. On behalf of the respondent-Corporation it was stated that the Corporation had discontinued the practice of calling parties for negotiations and inter-se bidding after opening the tenders.

This Court did not go into the controversy whether there should be inter-se bidding amongst the parties and the Court left that decision for the competent authority to take in accordance with law after taking into consideration any representations that the bidders may make. The petition was

accordingly disposed of on 14.2.2006 without expressing any opinion on the above controversy.

3.3 The present petition came to be filed on 27.2.2006. The petitioner's case is that immediately after the above order was passed on 14.2.2006, pursuant to the liberty reserved by this Court to the petitioner and other eligible bidders to make representation to the Corporation, the petitioner submitted its offer of Rs.13.41 crores by addressing a letter dated 15.2.2006 to the respondent-Corporation. There is no dispute about the fact that after receiving the said letter, the Corporation called upon respondent No.2 - Chitra Publicity to increase its offer and on 22.2.2006 respondent No.2 submitted its revised offer of Rs.14 crores (to be precise, Rs.14,00,00,013/-). Thereafter by letter dated 23.2.2006, the petitioner increased its offer to Rs.14.25 crores.

4. In response to the notice issued by this Court, affidavit in reply has been filed on behalf of the Corporation stating that the Chief Vigilance Commissioner of India has issued following instructions as per Circular dated 18.11.1998 :-

> “Tenders are generally a major source of corruption. In order to avoid corruption, a more transparent and effective system must be introduced. As post tender negotiations are the main source of corruption, post tender

> negotiations are banned with immediate effect except in the case of negotiations with L.1 (i.e. Lowest tenderer).”

The said circular was forwarded by the State Government in the Home Department, which is the administrative department for the respondent-Corporation for implementation for the purpose of improving transparency and integrity in Government departments. Since the contract in question was to be awarded for providing spaces for advertisement for price to be offered by the contractor, the instructions would mean that only the party offering the highest price i.e. the highest tenderer (H1)could be called for negotiations and respondent No.2 being the highest tenderer was alone required to be called for negotiations and, therefore, the Corporation has not committed any illegality.

5. At the hearing of this petition, Mr SI Nanavati, learned counsel for the petitioner has submitted as under :-

5.1 Since there was no upset price indicated in any NIT and there has never been any dispute about the petitioner's eligibility, in the past the respondent-Corporation ought to have either accepted the petitioner's offer when the petitioner's offer was found to be the highest or in case the highest offer was not found to be adequate, the parties ought

to have been called for inter-se bidding which is the recognized method of awarding a public contract for fetching the highest price. It is submitted that calling only one party for negotiations is illegal and smacks of malafides. The object of the tender process is to fetch the highest price for the contract in question. Strong reliance is placed on the decision of Apex Court in **Ram and Shyam Company vs. State of Haryana, AIR 1985 SC 1147**.

5.2 The method employed by the Corporation was never indicated in the tender notice. There are a large number of cases where after tenders are opened, the parties are called for inter-se bidding. Even this Court while hearing petitions in exercise of jurisdiction under Article 226 of the Constitution has been directing the concerned departments or establishments to hold auctions even before the Court and substantially higher offers are received on such auctions or inter-se bidding and, therefore, public interest also demands that the parties be called for inter-se bidding. Strong reliance is placed on the decision of the Apex Court in **Dutta Associates Pvt. Ltd. vs. Indo Merchantiles Pvt. Ltd., (1997) 1 SCC 53** in support of the proposition that fairness demands that the authority should notify in the tender notice itself, the procedure which they propose to adopt while accepting the tender and that in absence of such indication in the tender notice, any decision

taken pursuant to such tender process ought to be struck down.

6. Mr KB Trivedi with Mr Munshaw for the Corporation have submitted that the existing 3 year contract was for Rs.8.40 crores i.e. Rs.2.80 crores per year and, therefore, the Corporation was expecting offers in the region of Rs.14 crores for the five year contract. Hence, NIT of December 2005 was required to be cancelled when the highest offer of the petitioner was only Rs.10.86 crores. When NIT of January 2006 brought highest tender of RS.13.12 crores (approx.), the Corporation acted in accordance with the instructions of the Central Vigilance Commissioner by calling only the highest tenderer for negotiations so as to receive more than Rs.14 crores. Hence, there would be nothing illegal or improper in accepting the offer of respondent No.2 at Rs.14.11 crores. It is submitted that if all tenderers are allowed to revise their bids one after another, that would be a never ending process. The Corporation may be allowed to take some final decision at some point of time.

7. Mr Mihir Joshi appearing for respondent No.2 has submitted that when the tender notice clearly stated - “sealed tenders are invited”, inter se bidding was impliedly ruled out. The sanctity of the tender process would be lost if after opening the

sealed tenders, all the parties are again to be called for inter-se bidding. It is submitted that as per the instructions of the Vigilance Commissioner the Corporation has taken the decision in accordance with law and that no interference is called for. Strong reliance is placed on the decision of this Court in **Hindustan Door Oliver Ltd. vs. Vadodara Municipal Corporation, (1998) 2 GLH 706** in support of the contention that it is open to the Corporation to choose any one of the various tendering methods available to the Corporation and that this Court will not strike down one process as illegal or arbitrary merely because another process may appear to the Court to be better or more prudent.

8. Having heard the learned counsel for the parties, it is first necessary to take up for consideration the instructions issued by the Chief Vigilance Commissioner of India, which is the sole basis of the decision of the Corporation. Even at the cost of repetition, the relevant portion of the instructions as contained in the circular dated 18.11.1998 is required to be quoted verbatim :-

> “Tenders are generally a major source of corruption. In order to avoid corruption, a more transparent and effective system must be introduced. As post tender negotiations are the main source of corruption, post tender negotiations are banned with immediate effect except in the case of negotiations with L.1 (i.e. Lowest tenderer).”

Unfortunately, the circular of the CVC proceeds on the basis that post tender negotiations are being conducted or can be conducted only in a non-transparent manner where parties would be called one after another to revise their bids and, therefore, that could be a source of corruption. The CVC appears to be oblivious of the well recognized system or practice where all the eligible tenderers are called for inter-se bidding by the authority on the same date and at the same time and at the same place and inter se bidding takes place in presence of all the eligible parties which may take place immediately on opening of the tenders or thereafter. We are, therefore, of the view that the instructions of the Chief Vigilance Commissioner of India need to be read in light of the above discussion. The apprehension voiced by CVC, cannot, therefore, be invoked when all the eligible parties are to be called for inter-se biding on the same date, same time, same place and inter-se bidding is conducted in the presence of all the eligible parties who choose to remain present at such auction or inter-se bidding, upon receiving intimation to that effect either through the tender notice itself, the tender papers or through a subsequent notice.

9. Although in the facts of the present case, the decision of the Corporation not to proceed on the

basis of the tender notices issued in the past cannot be said to be unreasonable, arbitrary or malafide, a citizen would be justified in believing that he is being treated unfairly when every time the authority decides to discharge the tender notice when his offer happens to be the highest. There is some substance in the grievance being made on behalf of the petitioner that if the method adopted by the Corporation were to be adopted without its being indicated in the tender notice and without any upset price stipulated in the tender notice, everybody would be speculating as to how many times the authority would go on cancelling tender notices one after another and keep guessing on which particular occasion the authority will decide to proceed with the tender process on the basis of the offers received. Moreover, calling only the H1/L1 party for negotiations will not put that party under any pressure as there will be no other party to compete with and any further increase/decree in price would be a matter of negotiations only between the tendering authority and only one tenderer (H1 or L1, as the case may be). Hence the method suggested by the Central Vigilance Commissioner may itself be capable of being a source of corruption in the facts of a given case. One may understand the rationale of this policy, if the tendering authority's discretion to call parties for inter-se bidding is to be restricted to first two or three highest/lowest bidders, so that a tenderer would have to offer an

adequate bid to come within the zone of consideration for inter-se bidding.

10. Since the instructions of the CVC are capable of being understood and read as done by the Corporation, it is high time the CVC reconsiders the matter by issuing revised instructions after taking into consideration the observations made in this judgment.

11. In the facts of the present case, it is not the case of the Corporation that any upset price was indicated in any of the tender notices issued in the past or in the tender notice dated 23.1.2006. It is, however, the stand of the Corporation that since the petitioner was paying the fees of Rs.2.80 crore per year for the existing three year contract, when the tenders were invited for the five year contract the price was expected to be in the region of Rs.14 crores. Since the offers received in December 2005 fell far short of the said figure, the Corporation was justified in not accepting the highest offer of the petitioner and deciding to invite fresh tenders. As already indicated in our order dated 14.2.2006, we do not find fault with the said decision, but we cannot help observing that even after cancellation of four previous NITs, the Corporation did not stipulate the upset price of Rs.14 crores in the NIT dated 23.1.2006, and after opening the tenders on

10.2.2006, but for the present petition, the Corporation could have, and perhaps might have, accepted the highest offer of respondent No.2 at Rs.13.11 crores.

12. Since the CVC instructions themselves cannot be accepted as rational and require reconsideration or modification as discussed hereinabove, the Court is not in a position to uphold the decision of the Corporation which is solely based on the aforesaid instructions of the CVC, more particularly when the offers received by the Corporation in response to the tender notice dated 23.1.2006 did not cross the threshold of Rs.14 crores which the Corporation had set as the benchmark figure while discharging the previous notices though no such figure was indicated as upset price in any of the tender notices.

13. It is true that in Hindustan Door Oliver vs. Vadodara Municipal Corporation, (1998) 2 GLH 706, this Court has taken the following view :-

> “There may be difference of opinion on the question as to which is the best method – Whether to call the parties for open negotiations in presence of each other or whether the parties should be required to submit their respective final bids in sealed envelopes on the same date and at the same time or whether a technically more competent party should be first confronted with the final offers of the other less competent parties so as to persuade the more competent party to reduce its bid. It

would all depend on the facts and circumstances of each case and nature of the project and the contract and the competence of parties."

It is also true that as per the settled legal position, which was also discussed in the aforesaid decision, this Court does not sit as a Court of appeal but merely reviews the manner in which the decision was taken. Even so, if the Corporation has itself adopted a particular method of processing the tenders and acts without disclosing such method in the tender notice, the action could suffer from the vice of arbitrariness or at least unfairness as held in **Dutta Associates Pvt. Ltd. vs. Indo Merchantiles Pvt. Ltd., (1997) 1 SCC 53.** The Apex Court has laid down in the said decision that fairness demands that the authority should notify in the tender notice itself the procedure which they propose to adopt while accepting the tender. The learned counsel for the respondent, of course, attempted to distinguish both the decisions in Ram and Shyam Company and Dutta Associates Pvt. Ltd. on the ground that the authorities in those cases had permitted a party at H2 or L2 position to revise their bid without giving an opportunity to the others.

14. However, merely because the tender notice invited the parties to submit sealed tenders does not necessarily mean that the Corporation was not going

to call the parties for inter-se bidding or that only the highest tenderer was going to be given a opportunity to revise its bid. The terms of the tender have to be considered in the context of the current practices in the trade and business. In such matters, we have noticed that even where sealed tenders are invited in a large number of cases, all the eligible parties are called upon by the authority to participate in the inter-se bidding. Hence it cannot be said that the words “sealed tenders are invited” by themselves would mean that the Corporation was not going to invite the parties for inter-se bidding. In a large number of cases before this Court, the Court has permitted or even directed inter-se bidding or rebidding and the offers received at such inter-se biddings have even doubled.

15. We would also like to clarify that the observations are being made in the context of a contract to be awarded by the authority to a party paying consideration for utilizing the authority's space, goods or services and that the contract is not for providing goods or services to the authority or undertaking a technical project for the authority.

16. In view of the above discussion and in view of the principles laid down by the Apex Court holding that the object of a public authority in such cases should be to fetch the maximum price subject to any

other rational considerations, the following directions are issued :-

(a) The respondent-Corporation shall take a decision in the matter either after calling all the eligible parties who had submitted their tenders in response to the notice dated 23.1.2006 for inter-se re-bidding on the same date, at the same time and at the same place in presence of all eligible parties who choose to remain present at such inter-se bidding and thereafter to take a fresh decision in the matter, or in the alternative to invite fresh tenders after indicating in the tender notice the upset price and the procedure that they propose to follow.

(b) The petitioner being the existing contractor shall pay the price for the period from 15.12.2005 till the date the new contract is awarded in accordance with the above directions, at the rate at which the new contract will be awarded or the current rate, whichever is higher.

17. The petition is accordingly allowed in the aforesaid terms.

Rule is made absolute to the aforesaid extent.

A copy of this judgment shall also be sent to the Central Vigilance Commissioner of India, New Delhi for information and such action as the learned Commissioner may consider necessary after considering the observations made in this judgment, particularly in paras 8 to 10 hereinabove.

18. At this stage, the learned counsel for respondent No.2 prays for stay of operation of this judgment for a period of three weeks in order to have further recourse in accordance with law.

In the facts and circumstances of the case, the request is rejected as the Corporation itself is going to take the final decision in the matter in the best possible public interest.

(M.S. SHAH, J.)

(SHARAD D DAVE, J.)

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